

NTSB Order No. EM-193

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of July, 2002

Appellant.

Docket ME-171

Appellant, by counsel, seeks review of a decision of the Vice Commandant (Appeal No. 2622, dated March 15, 2001) affirming a decision entered by Coast Guard Chief Administrative Law Judge Peter A. Fitzpatrick on April 13, 2000, following a hearing on November 9 and 10, 1999.¹ The law judge sustained a charge of misconduct on an allegation that the appellant, while serving as

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a pilot aboard the Tank Vessel CHELSEA under the authority of his Merchant Mariner's License (No. 036785), had failed to sound a warning signal (five short whistle blasts) prior to his vessel's collision with a container ship, the M/V MANZANILLO on January 29, 1999, in the vicinity of Miami Harbor Sea Buoy. He therefore ordered that appellant's license be suspended for five months, one month outright with four additional months' suspension remitted on twelve months' probation. For the reasons discussed below, we will grant the appeal.

The facts surrounding the collision and the appellant's involvement in it are extensively set forth in the decisions of the law judge and the Vice Commandant.² Only a few of them are relevant to our review of, and disagreement with, the law judge's finding that appellant, pursuant to 72 COLREGS Rule 34(d), was obligated to sound a warning signal. That finding is predicated on the law judge's assessment that appellant was not sure whether his vessel could avoid a collision after the unilateral decision of the other vessel's pilot to execute a port-side passing after agreement with him had been reached on a starboard to starboard passing.³ That assessment, in our view, does not square with the

²The Coast Guard had charged appellant with misconduct, for allegedly violating three different rules established by the 1972 Convention on the International Regulations for Preventing Collisions at Sea ("72 COLREGS"), and with negligence in connection with the incident. The law judge rejected the negligence allegation and found only one rule violation.

³Rule 34(d) provides as follows:

Rule 34(d)
Maneuvering and Warning Signals

record.

We do not agree that appellant's radio communications with the pilot of the MANZANILLO can reasonably be read as evincing doubt over whether a collision could be avoided if a port-to-port passing were attempted.⁴ To the contrary, we think they clearly registered appellant's firm conviction that, given the relative positions of the vessels when the pilot of the MANZANILLO advised that he would take his vessel to the CHELSEA's port side, a collision was inevitable.⁵ The issue is not whether the appellant had time to sound a danger signal; he clearly did. The only issue under the rule relevant to the Coast Guard's charge is whether appellant was "in doubt whether sufficient action [was] being taken by the [MANZANILLO] to avoid collision." Appellant's
(..continued)

(d) When vessels in sight of one another are approaching each other and from any cause either vessel fails to understand the intentions or actions of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall immediately indicate such doubt by giving at least five short and rapid blasts on the whistle. Such signal may be supplemented by a light signal of at least five short and rapid flashes.

⁴It is not clear from the record why the Vice Commandant and law judge believe that whistle communications must be utilized even though the parties have fully communicated their maneuvering intentions and concerns by radio, bridge to bridge. We note, however, that the courts, in the context of admiralty litigation, do not share the Vice Commandant's position that a whistle signal must be sounded even in situations in which all agree it would not have done any good (that is, helped to avert a collision).

⁵Indeed, it is fair to say that both the appellant and the CHELSEA's master were shocked and alarmed at the last minute decision of the MANZANILLO's pilot to maneuver his vessel in a manner that they unhesitatingly believed could not be safely accomplished.

unequivocal, albeit ignored, rejection of the proposed change to the passing agreement establishes that he did not, within the meaning of Rule 34(d), entertain such doubt. Had he sounded the danger signal at that point, it would have been to alert others not privy to his radio communications with the MANZANILLO of the imminence of a collision, not to warn the MANZANILLO that he doubted whether that vessel was doing enough to avoid one.⁶ In any event, we do not agree that the signal was mandatory in the circumstances presented. It follows that appellant's failure to give one was not misconduct.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is granted; and
2. The decision of the Vice Commandant affirming the decision and order of the law judge is reversed.

BLAKEY, Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. CARMODY, Vice Chairman, did not concur.

⁶It may well be that using the danger signal to warn others of the nearness of a collision would be beneficial, but that is not a purpose for which use of the signal is required by the rule.